In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 189

CHARLES I. LICHTENSTEIN a/k/a CHARLES WELLS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. I) is reported at 341 F.2d 476.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1965 (Pet. App. II). A petition for rehearing was denied on April 9, 1965 (Pet. App.

III). On May 7, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 31, 1965 and the petition was filed on May 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for conspiracy to use interstate communication facilities for wagering.

STATEMENT

After a waiver of trial by jury (R. 29-31), petitioner was tried and convicted in the United States District Court for the Southern District of Florida for conspiring with others to use the telephone and telegraph, while engaged in the business of betting and wagering, for transmitting in interstate commerce bets and wagers and money received therefrom, and also to use the telephone with intent to promote an unlawful activity, in violation of 18 U.S.C. 371, 1084 and 1952[1] (R. 420). He was sentenced to imprisonment for two years (R. 15-16). The court of appeals affirmed per curiam.

The evidence may be summarized as follows:

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[1] The indictment (R. 1-8) also charged substantive counts—Reid alone in four such counts; Reid, Penso and Kalfin in one; and Reid and petitioner in one which alleged the use, on May 14, 1962, of the telegraph for transmitting from Tampa, Florida, to New York, of a communication entitling the recipient to receive money from bets and wagers in violation of 18 U.S.C. 1084 and 2. Petitioner was acquitted on this count.

Dr. Henagan, a veterinarian, of Tampa, Florida, testified that in April 1962 he entered into an arrangement whereby he would place bets on horse races by telephoning, using code names, a "Red" or "Ed Reid" at a New York number. Dr. Henagan's Tampa number was 251-1727 and the New York number called was TR 3-0320 (R. 43-60). At the end of a week of such betting Dr. Henagan owed $3700 (R. 82). He was directed by Reid to send the money by Western Union to Charles Wells, 2114 Broadway, New York City, using the code word on the telegram "all clear" and to sign as "Brother Howard" [2] (R. 73, 77).

When Dr. Henagan failed to pay the gambling losses as directed, he was visited in his Tampa office by the codefendant Penso. Penso was arrested there on May 14, 1962 in the process of accepting cash from the veterinarian (R. 76, 83-87).

Shortly after the arrest of Penso, Dr. Henagan received two telephone calls from the New York code number directing that the money be sent to Charles Wells (R. 78; 109-110). Following a conference with authorities, Henagan sent a $25 Western Union money order to Charles Wells, 2114 Broadway, New York City (R. 78, 81).

That afternoon in New York, petitioner, who was known to the Western Union employee at this office at 2114 Broadway "from previous transactions",

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[2] Dr. Henagan's testimony as to this arrangement was corroborated by handwritten notes and telephone toll tickets admitted into evidence (Exhibits 1, 2, 3; R. 57, 71, 123).

came in to claim the order and receive the cash proceeds (R. 153-155). He was arrested at this point by federal agents acting pursuant to a warrant (R. 318-320). At this time petitioner told the officers that he was Charles Wells and that he lived at 233 West 99th Street, New York (R. 320). On his person were several slips of paper, introduced in evidence at trial, bearing notations of Dr. Henagan's name and Tampa, Florida telephone number, and the words "all clear Brother Howard Wells". There was also a Western Union company receipt showing receipt of $100 from Charles Wells, 233 West 99th Street, RI 9-8660, for transmittal to Gerry Penso at a Miami, Florida address (Exhibits 20, 21, 23, 24; R. 395).

At the time of the codefendant Penso's arrest in Tampa, he carried a small notebook with enclosures, introduced into evidence at trial (Exhibit 14, R. 228). There were notations of the transaction, including Henagan's name and address, agreed upon call numbers, the address 2114 Broadway, the names C. Wells, Red Reid and the New York numbers TR 3-0320 and RI 9-8660 (R. 224, 226, 228-230).

Toll tickets of the New York Telephone Company for TR 3-0320, showed April incoming calls to Charlie Wells from Jerry[3] and Girard, and an outgoing call to Tampa, Florida 251-1727 (R. 176, 178; Exhibit 9, R. 194). Toll tickets also showed that the number RI 9-8660 was listed to Gerry Wells at 233 West 99th Street, New York, and that Charles Wells ac-

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[3] When the codefendant Kalfin was arrested, he identified Penso to officers as "Jerry" (R. 305).

cepted collect calls from Girard on May 1, and made a call to 251-1727 Tampa (R. 209-212; Exhibit 11, R. 200, 204, 206).

ARGUMENT

There is no occasion for this Court to review the sufficiency of the evidence to support petitioner's conviction for conspiracy to use interstate communication facilities for wagering.[4] The existence of the conspiracy and the part of Charles Wells as the intended recipient of funds resulting from wagering was established conclusively by the testimony of Dr. Henagan, corroborated by his memoranda and the memoranda of the codefendant Penso. That petitioner was in fact the Charles Wells involved was established by his collection of the funds forwarded by Dr. Henagan, memoranda on his person showing details of the scheme, and records showing telephonic or telegraphic contact with the doctor's Florida number and the codefendant Penso.

Petitioner's argument that at the time he collected the proceeds of the money order the conspiracy was

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[4] The claim that the observation in the opinion of the court below, that "Appellant does not deny having done the acts that are alleged as the overt acts under the conspiracy", is a holding that petitioner's failure to take the stand justifies a finding of guilt, is frivolous. One overt act charged was that petitioner entered the New York Western Union office, signed a receipt for a money order and accepted the money conveyed thereby. Petitioner, through his counsel at trial (R. 379-280), in his brief in the court below and his petition in this court (Pet. 20, 26, 31), admitted these acts. The fact that they were committed in furtherance of the scheme was established by the evidence.

at an end, because of the arrest shortly before of the codefendants Penso and Kalfin, leads nowhere. Even if the termination of the conspiracy be assumed, evidence as to this act was nevertheless admissible to prove the nature of the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604.

The suggestion that acquittal on the substantive count was proof that he did not commit the overt act and entitled him to be acquitted on the conspiracy count is without merit. The court ruled that since the substantive count, in which petitioner was charged with Reid, made reference to 18 U.S.C. 2, petitioner was charged in that count as an aider and abetter of Reid who was not tried, and that therefore the proof failed as to petitioner (R. 410). In any event, consistency in a verdict is not required.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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